

# State Office of Administrative Hearings



Cathleen Parsley  
Chief Administrative Law Judge

October 13, 2011

Les Trobman, General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin Texas 78711-3087

**VIA HAND DELIVERY**

Re: SOAH Docket No. 582-11-1905; TCEQ Docket No. 2009-1759-PST-E;  
Executive Director of the Texas Commission on Environmental Quality vs.  
Chwiki Corporation, d/b/a Panther Market

Dear Mr. Trobman:

The above-referenced matter will be considered by the Texas Commission on Environmental Quality on a date and time to be determined by the Chief Clerk's Office in Room 201S of Building E, 12118 N. Interstate 35, Austin, Texas.

Enclosed are copies of the Proposal for Decision and Order that have been recommended to the Commission for approval. Any party may file exceptions or briefs by filing the documents with the Chief Clerk of the Texas Commission on Environmental Quality no later than November 2, 2011. Any replies to exceptions or briefs must be filed in the same manner no later than November 15, 2011.

This matter has been designated **TCEQ Docket No. 2009-1756-PST-E; SOAH Docket No. 582-11-1905**. All documents to be filed must clearly reference these assigned docket numbers. All exceptions, briefs and replies along with certification of service to the above parties shall be filed with the Chief Clerk of the TCEQ electronically at <http://www10.tceq.state.tx.us/epic/efilings/> or by filing an original and seven copies with the Chief Clerk of the TCEQ. Failure to provide copies may be grounds for withholding consideration of the pleadings.

Sincerely,

A handwritten signature in cursive script that reads "Michael J. O'Malley".

Michael J. O'Malley  
Administrative Law Judge

MJO/pp  
Enclosures  
cc: Service List

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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**AGENCY:** Environmental Quality, Texas Commission on (TCEQ)  
**STYLE/CASE:** CHWIKI CORP / PANTHER MARKET  
**SOAH DOCKET NUMBER:** 582-11-1905  
**REFERRING AGENCY CASE:** 2009-1756-PST-E

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<b>STATE OFFICE OF ADMINISTRATIVE HEARINGS</b>	<b><u>ADMINISTRATIVE LAW JUDGE</u> ALJ MICHAEL J. OMALLEY</b>
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<b>REPRESENTATIVE / ADDRESS</b>	<b>PARTIES</b>
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EXECUTIVE DIRECTOR

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MAJD CHWIKI  
CHWIKI CORP./ PANTHER MARKET  
425 EAST HIGHWAY 67  
DUNCANVILLE, TX 75137

CHWIKI CORP./ PANTHER MARKET

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**SOAH DOCKET NO. 582-11-1905  
TCEQ DOCKET NO. 2009-1756-PST-E**

**EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY**

**v.**

**CHWIKI CORP. d//b/a PANTHER  
MARKET,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

**I. INTRODUCTION**

The Executive Director (ED) requests that the Texas Commission on Environmental Quality (Commission or TCEQ) assess an administrative penalty against the Respondent, Chwiki Corp., d/b/a Panther Market, for violations of the TCEQ's rules regarding underground storage tanks (USTs). Respondent did not contest that the alleged violations occurred or the calculation of the penalty, but argued that he could not afford to pay the recommended penalty. The Administrative Law Judge (ALJ) recommends that the Commission assess an administrative penalty of \$9,210 against Respondent with a 36-month payout.

**II. PROCEDURAL HISTORY AND JURISDICTION**

The hearing convened on September 23, 2011, before ALJ Michael J. O'Malley in the William P. Clements Building, 300 West 15th Street, Fourth Floor, Austin, Texas. The ED was represented by Gary K. Shiu, Staff Attorney, Litigation Division. Mr. Mazin Chwiki appeared and represented Respondent. The record closed on October 11, 2011, after the stipulation was filed. Jurisdiction and notice were not disputed and these issues are addressed in the findings of fact and conclusions of law in the Proposed Order without further discussion here.

### III. DISCUSSION

#### A. Violations

Respondent owns and operates a UST system and a convenience store with retail sales of gasoline located at 454 East Highway 67, Duncanville, Dallas County, Texas. The USTs at the facility are not exempt or excluded from regulation and contain a regulated petroleum substance.<sup>1</sup>

During an investigation conducted September 8, 2009, through September 10, 2009, the ED inspected the store and tanks and found multiple violations. Based on this inspection, the ED alleged that Respondent violated the following laws:

- Failed to report a suspected release within 24 hours. 30 TEX. ADMIN. CODE § 334.72(3)(B).
- Failed to investigate a suspected release of regulated substances within 30 days of discovery. 30 TEX. ADMIN. CODE § 334.74.
- Failed to maintain all components of a UST system in a manner that will prevent releases of regulated substances. 30 TEX. ADMIN. CODE § 334.42(a).
- Failed to monitor USTs for releases at a frequency of at least once every month. 30 TEX. ADMIN. CODE § 334.50(b)(1)(A) and TEX. WATER CODE ANN. § 26.3475(c)(1).

Respondent stated at the evidentiary hearing that he is not contesting the facts of the case and conceded that the violations occurred. Therefore, the ALJ takes the facts as stated in the ED's First Amended Report and Petition (EDFARP) as true. Furthermore, on October 11, 2011, the parties filed a stipulation in which Respondent agreed to the violations and to the calculation of the penalty.<sup>2</sup>

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<sup>1</sup> ED Ex. 8, EDFARP at 4.

<sup>2</sup> See Attachment A. The ALJ admits in evidence the Joint Stipulations as ED-14.

**B. Corrective Action and Administrative Penalties**

Under TEX. WATER CODE ANN. § 7.051, the Commission is authorized to assess an administrative penalty against a person who violates a provision of the Water Code or the rules adopted by the Commission. The penalty may not exceed \$10,000 per day of violation of the applicable law. TEX. WATER CODE ANN. § 7.052. A respondent has the burden of proof regarding its financial inability to pay the recommended administrative penalty. 30 TEX. ADMIN. CODE § 70.8.

In the EDFARP, the ED requested that the Commission require Respondent to pay \$12,100 in administrative penalties and to take corrective action to bring the USTs into compliance with state law. At the hearing, the ED stated that Respondent was making a good-faith effort to comply with the corrective action plan and, based on his good-faith effort, the ED reduced the penalty to \$9,350.

Donna Chaffin testified on behalf of the ED regarding the recommended administrative penalty given the violations in this case. Although the ED initially requested a \$9,350 administrative penalty, Respondent was eligible for a financial review and possibly a reduced penalty.

Respondent, therefore, submitted financial information to the ED for a financial analysis. Ms. Chaffin testified that that, pursuant to TCEQ policy, Respondent was eligible for a review of its ability to pay the recommended penalty. The TCEQ policy provides that if the penalty is less than one percent of annual gross revenues or less than \$3,601, then a respondent is not eligible for such a review and the ED will not perform the financial analysis.<sup>3</sup> Because Respondent's penalty was greater than this amount, it was eligible for financial review.

In this case, Ms. Chaffin reviewed Respondent's financial information, which showed that it had gross receipts of \$920,998. One per cent of Respondent's gross receipts is \$9,210.

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<sup>3</sup> ED Ex. 13, Financial Ability to Pay Review Policy at 1.

Therefore, Mr. Chaffin recommended that Respondent pay of penalty of \$9,210 over 36 months. Ms. Chaffin further stated that, under the TCEQ policy, \$9,210 is the lowest the penalty can be reduced because it is 1 percent of annual gross revenues. The ED characterizes the \$9,210 as a deferred penalty rather than a reduced penalty because the deferral is contingent upon Respondent's full compliance with the Commission's final Order.

Mr. Chwiki testified that, based on his current financial situation, he cannot afford to pay the \$9,210 over 36 months. Mr. Chwiki never stated how much he could pay, just that \$9,210 is too much. Furthermore, regarding TCEQ's policy on eligibility for an inability to pay review, Mr. Chwiki testified that it is unfair to determine the penalty amount based solely on its gross revenues without considering losses. He stated that this policy fails to consider other factors that could impact its ability to pay the penalty.

### **C. ALJ's Analysis**

Respondent simply argues that it cannot pay the \$9,210 but offers no evidence showing an amount that can be paid. Although the Respondent admitted various financial documents in evidence, most of the documents were not relevant to the issues in this case. Furthermore, the ED followed the TCEQ Financial Ability to Pay Review Policy in calculating the penalty, and the ALJ does not have sufficient evidence to independently calculate an alternate penalty amount. After reviewing the evidence, the ALJ concludes that the financial review penalty of \$9,210, calculated using TCEQ's current policy for computing such penalties, is appropriate in this case.

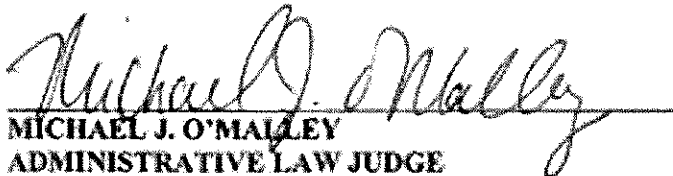
Regarding Respondent's position on TCEQ's policy of relying on gross revenues without regard for Respondent's profitability, the ALJ declines to express an opinion on whether that policy is sound. The evidence in the record shows that the Commission approved this policy, which the ED has implemented in other enforcement cases.

Regarding Respondent's ability to pay the penalty, the ED followed the TCEQ's practice of first determining whether a respondent is eligible for such a review. After conducting a

financial review, the penalty was reduced to \$9,210. The ALJ concludes that the ED followed its policy and properly determined that based on Respondent's 2010 gross revenues, Respondent should pay the \$9,210 penalty.

The ALJ recognizes that this penalty may impose a greater burden on a small business, nevertheless TCEQ's practices were followed in this case and the recommended penalty of \$9,210 was properly calculated and should be paid. The ALJ recommends that the Commission require Respondent to pay \$9,210 over 36 months (approximately \$255 per month).

**SIGNED October 13, 2011.**

  
**MICHAEL J. O'MALLEY**  
**ADMINISTRATIVE LAW JUDGE**  
**STATE OFFICE OF ADMINISTRATIVE HEARING**

# ATTACHMENT A



**SOAH DOCKET NO. 582-11-1905  
TCEQ DOCKET NO. 2009-1756-PST-E**

**EXECUTIVE DIRECTOR OF THE TEXAS  
COMMISSION ON ENVIRONMENTAL  
QUALITY,  
PETITIONER,**

**VS.**

**CHWIKI CORP.  
D/B/A PANTHER MARKET,  
RESPONDENT**

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**BEFORE THE**

**STATE OFFICE OF**

**ADMINISTRATIVE HEARINGS**

**JOINT STIPULATIONS**

Pursuant to Administrative Law Judge ("ALJ") Order No. 2, the Executive Director ("ED") of the Texas Commission on Environmental Quality ("TCEQ" or "Commission") and respondent CHWIKI CORP. d/b/a Panther Market ("Respondent") hereby stipulate and agree to the following:

1. The facility at issue in this enforcement contains an underground storage tank ("UST") system and a convenience store with retail sales of gasoline located at 454 East Highway 67, Duncanville, Dallas County, Texas (the "Facility"). The USTs at the Facility are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission, and contain a regulated petroleum substance as defined in the rules of the TCEQ.
2. The Facility is known as Panther Market, with a TCEQ petroleum storage tanks facility identification number 25167.
3. The USTs at the Facility are not exempt or excluded from regulation under the Texas Water Code or the rules of the Commission, and contain a regulated petroleum substance as defined in the rules of the TCEQ.
4. During an investigation conducted on September 8, 2009 through September 10, 2009 ("Investigation"), a TCEQ Dallas/Fort Worth Regional Office investigator documented that Respondent violated the following requirements:
  - a. 30 TEX. ADMIN. CODE § 334.72(3)(B), by failing to report a suspected release to the TCEQ within 24 hours of the discovery. Specifically, the inventory control records for April and May 2009 indicated a suspected release that was not reported;
  - b. 30 TEX. ADMIN. CODE § 334.74, by failing to investigate a suspected release of regulated substances within 30 days of discovery. Specifically, the inventory control records for April and May 2009 indicated a suspected release that was not investigated;
  - c. 30 TEX. ADMIN. CODE § 334.42(a), by failing to maintain all components of the UST system in a manner that will prevent releases of regulated substances. Specifically, the line leak detector of the Facility's UST system had a hole, and

the submersible pump container of the Facility's UST system was cracked;  
and

- d. 30 TEX. ADMIN. CODE § 334.50(b)(1)(A) and TEX. WATER CODE § 26.3475(c)(1), by failing to monitor USTs for releases at a frequency of at least once every month (not to exceed 35 days between each monitoring).
5. At the time of the Investigation, Respondent was the owner and operator, as defined in 30 TEX. ADMIN. CODE § 334.2(73) and (70), of the UST system at the Facility.
6. The violations identified during the Investigation were documented in Investigation Report No. 777315 ("Investigation Report")<sup>1</sup>.
7. The Executive Director and Respondent agree that the violations identified during the Investigation occurred and the violations were accurately documented in the Investigation Report.
8. The Executive Director and Respondent agree that the administrative penalty of nine thousand three hundred fifty dollars (\$9,350.00) specified in the Penalty Calculation Worksheet<sup>2</sup> was correctly calculated.
9. The Executive Director and Respondent agree that Respondent shall perform the corrective measures outlined in paragraph No. 17 in the Executive Director's First Amended Report and Petition ("EDFARP")<sup>3</sup> and that the corrective measures outlined in paragraph No. 17 in the EDFARP are appropriate.
10. The Executive Director and Respondent agree that the Executive Director is seeking a deferred penalty<sup>4</sup> amount of nine thousand two hundred ten dollars (\$9,210.00), payable in thirty-six (36) monthly installments, based on the Financial Ability to Pay review conducted by TCEQ Financial Analyst Donna Chaffin<sup>5</sup>.
11. The Executive Director and Respondent agree that the material allegations in this enforcement matter and the EDFARP are true and accurate, and the only remaining contested issue is Respondent's ability to pay the nine thousand two hundred ten dollars (\$9,210.00) administrative penalty in this case.

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<sup>1</sup> Exhibit ED-1.

<sup>2</sup> Exhibit ED-10.

<sup>3</sup> Exhibit ED-8.

<sup>4</sup> This is a "deferred penalty" rather than a reduced penalty because the deferral is contingent upon Respondent's full compliance with the Final Commission Order for this case.

<sup>5</sup> According to Donna Chaffin's expert testimony during the Evidentiary Hearing on the Merits held at the State Office of Administrative Hearings on September 23, 2011.

## Joint Stipulations

TCEQ v. Chwilk Corp. d/b/a Panther Market

SOAH Docket No. 582-11-1903

TCEQ Docket No. 2009-1756-PSY-E

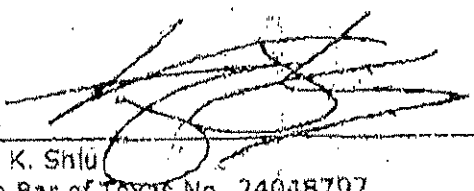
Page 3

Respectfully Submitted, \_

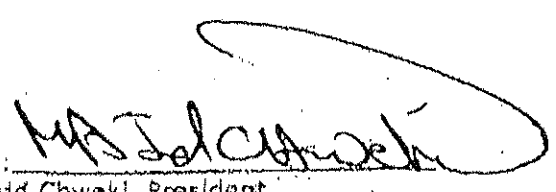
Texas Commission on Environmental Quality

Mark R. Vickery, P.G.  
Executive DirectorStephanie Bergeron Perdue, Deputy Director  
Office of Legal ServicesKathleen C. Dacker, Director  
Litigation Division

by

  
Gary K. Shlu  
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Litigation Division, MC R-12  
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(713) 422-8916  
(713) 422-8910 (FAX)  
[gary.shlu@tceq.texas.gov](mailto:gary.shlu@tceq.texas.gov)

by:

  
Majd Chweki, President  
Chwilk Corp. d/b/a Panther Market  
454 East Highway 67  
Duncanville, Texas 75137

# TEXAS COMMISSION ON ENVIRONMENTAL QUALITY



## **AN ORDER Assessing Administrative Penalties Against Chwiki Corp. d/b/a Panther Market TCEQ Docket No. 2009-1756-PST-E SOAH Docket No. 582-11-1905**

On \_\_\_\_\_, the Texas Commission on Environmental Quality (TCEQ or Commission) considered the Executive Director's (ED's) First Amended Preliminary Report and Petition recommending that the Commission enter an order assessing administrative penalties against Chwiki Corp. d/b/a Panther Market (Respondent). A Proposal for Decision (PFD) was presented by Michael J. O'Malley, an Administrative Law Judge (ALJ) with the State Office of Administrative Hearings (SOAH).

After considering the ALJ's PFD, the Commission adopts the following Findings of Fact and Conclusions of Law:

### **I. FINDINGS OF FACT**

1. Respondent owns and operates an underground storage tank (UST) system and a convenience store with retail sales of gasoline located at 454 East Highway 67, Duncanville, Dallas County, Texas. The USTs at the facility are not exempt or excluded from regulation and contain a regulated petroleum substance.
2. During an investigation conducted on September 8, 2009, through September 10, 2009, the ED inspected the store and tanks and found multiple violations.
3. Respondent failed to report a suspected release within 24 hours. 30 TEX. ADMIN. CODE § 334.72(3)(B).

4. Respondent failed to investigate a suspected release of regulated substances within 30 days of discovery. 30 TEX. ADMIN. CODE § 334.74.
5. Respondent failed to maintain all components of a UST system in a manner that will prevent releases of regulated substances. 30 TEX. ADMIN. CODE § 334.42(a).
6. Respondent failed to monitor USTs for releases at a frequency of at least once every month. TEX. WATER CODE ANN. § 26.3475(c)(1) and 30 TEX. ADMIN. CODE § 334.50(b)(1)(A).
7. Respondent received notice of the violations on or about October 26, 2009.
8. The Commission has adopted a Penalty Policy, effective September 1, 2002, setting forth its policy regarding the computation and assessment of administrative penalties.
9. On October 8, 2010, the ED filed its Preliminary Report and Petition assessing an administrative penalty and setting forth a corrective action plan to bring the USTs into compliance with state law.
10. On November 8, 2010, Respondent filed an answer to the Preliminary Report and Petition and requested a hearing.
11. On December 13, 2010, the ED referred this matter to SOAH for a contested case hearing.
12. On January 4, 2011, the Commission's Chief Clerk mailed notice of the preliminary hearing scheduled for February 10, 2011, to Respondent at 454 East Highway 67, Duncanville, Texas 75137.
13. The notice of hearing stated the time, date, place, and nature of the hearing, stated the legal authority and jurisdiction for the action, set forth the alleged violations, and advised Respondent, in at least twelve-point bold-faced type, that failure to appear at the

preliminary hearing or the evidentiary hearing in person or by legal representative would result in the factual allegations contained in the notice, and attached Preliminary Report and Petition, being deemed as true, and the relief sought in the notice possibly being granted by default.

14. On February 10, 2011, a preliminary hearing was held and a procedural schedule was adopted.
15. On September 15, 2011, the ED filed its First Amended Report and Petition, and mailed it to Petitioner on the same date.
16. In the First Amended Report and Petition, the ED assessed a \$12,100 administrative penalty based on the violations. Based on good-faith efforts to comply, the ED further reduced the penalty to \$9,350.
17. The hearing on the merits was held on September 23, 2011, in Austin, Texas. Both parties participated in the hearing.
18. October 11, 2011, the parties filed a stipulation in which Respondent agreed to the violations and the calculation of the penalty.
19. Respondent did not dispute the facts alleged in the First Amended Report and Petition and conceded that the violations occurred.
20. Respondent submitted financial records to the ED for an analysis of its inability to pay the recommended administrative penalty.
21. Pursuant to the TCEQ Financial Ability to Pay Review Policy, Respondent qualified for a financial review.
22. Respondent's financial information showed gross receipts of \$920,998. One percent of Respondent's gross receipts is \$9,210, which is the recommended penalty.

23. Under the TCEQ Financial Ability to Pay Review Policy, \$9,210 is the lowest the penalty can be reduced because it is 1 percent of annual gross revenues.
24. Respondent is making a good-faith effort to bring the USTs into compliance with state law and has exhibited good faith in responding to this enforcement action.
25. The \$9,210 penalty is a deferred penalty rather than a reduced penalty because the deferral is contingent upon Respondent's compliance with the Commission's Final Order.
26. Respondent has the ability to pay the recommended administrative penalty if paid out over 36 months.

## **II. CONCLUSIONS OF LAW**

1. Under TEX. WATER CODE ANN. §§ 7.051 and 7.073, the Commission may assess an administrative penalty against any person who violates a provision of the Texas Water Code or of the Texas Health and Safety Code within the Commission's jurisdiction or who violates a Commission administrative rule, order, or permit, and also may order the violator to take corrective action.
2. SOAH has jurisdiction over matters related to the hearing in this matter, including the authority to issue a Proposal for Decision with Findings of Fact and Conclusions of Law, pursuant to TEX. GOV'T CODE ANN. ch. 2003.
3. Respondent is subject to the jurisdiction of the Commission in regard to the operation of petroleum storage tanks, including petroleum USTs, pursuant to TEX. WATER CODE ANN. § 5.013.
4. Respondent timely requested a contested case hearing, pursuant to 30 TEX. ADMIN. CODE § 70.105.

5. Respondent received sufficient notice of the hearing on the alleged violations and the recommended penalties and corrective actions, pursuant to TEX. GOV'T CODE ANN. §§ 2001.051(1) and 2001.052; TEX. WATER CODE ANN. § 7.058; and 30 TEX. ADMIN. CODE §§ 1.12, 39.25, 70.104, and 80.6(c).
6. Based on the above Findings of Fact, Respondent violated TEX. WATER CODE ANN. § 26.3475(c)(1), 30 TEX. ADMIN. CODE §§ 334.72(3)(B), 334.74, 334.42(a), and 334.50(b)(1)(A).
7. The ED's recommended penalty properly considered the factors required by TEX. WATER CODE ANN. § 7.053, including: its impact or potential impact on public health and safety, natural resources and their uses, and other persons; the nature, circumstances, extent, duration, and gravity of the prohibited act; the history and extent of previous violations by the violator; the violator's degree of culpability, good faith, and economic benefit gained through the violation; the amount necessary to deter future violations; and any other matters that justice may require.
8. Based on consideration of the above Findings of Fact, the elements set forth in TEX. WATER CODE ANN. §§ 7.052 and 7.053, the Commission's Penalty Policy, and the Commission's Financial Ability to Pay Review Policy, the ED correctly calculated the penalties for the alleged violations, resulting in a total administrative penalty of \$9,210.
9. The ED met his burden of proof to show an administrative penalty of \$9,210 is warranted for the violations found and should be assessed against Respondent.
10. Respondent failed to meet his burden of proof to establish its inability to pay the recommended administrative penalty, pursuant to 30 TEX. ADMIN. CODE § 70.8.

**NOW, THEREFORE, IT IS ORDERED BY THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, IN ACCORDANCE WITH THESE FINDINGS OF FACT AND CONCLUSIONS OF LAW, THAT:**



1. Respondent is assessed an administrative penalty in the amount of \$9,210 for violations TEX. WATER CODE. ANN. § 26.3475(c)(1), 30 TEX. ADMIN. CODE §§ 334.72(3)(B), 334.74, 334.42(a), and 334.50(b)(1)(A).
2. Respondent shall pay \$255.58 each month for 36 months.
3. The payment of this administrative penalty and Respondent's compliance with all the terms and conditions set forth in this Order will completely resolve the matters set forth by this Order. The Commission shall not be constrained in any manner from requiring corrective actions or penalties for other violations that are not raised here. All checks submitted to pay the penalty assessed by this Order shall be made out to "Texas Commission on Environmental Quality." Administrative penalty payments shall be sent with the notation "Re: Chwiki Corp. d/b/a Panther Market, Docket No. 2009-1759-PST-E" to:

Financial Administration Division, Revenues Section  
Attention: Cashier's Office, MC 214  
Texas Commission on Environmental Quality  
P.O. Box 13088  
Austin, Texas 78711-3088

4. The ED may refer this matter to the Office of the Attorney General of the State of Texas for further enforcement proceedings without notice to Respondent if the ED determines that Respondent has not complied with one or more of the terms or conditions in this Commission Order.
5. All other motions, requests for entry of specific Findings of Fact or Conclusions of Law, and any other requests for general or specific relief, if not expressly granted herein, are hereby denied.
6. The effective date of this Order is the date the Order is final, as provided by TEX. GOV'T CODE ANN. § 2001.144 and 30 TEX. ADMIN. CODE § 80.273.

7. The Commission's Chief Clerk shall forward a copy of this Order to Respondent.
8. If any provision, sentence, clause, or phrase of this Order is for any reason held to be invalid, the invalidity of any provision shall not affect the validity of the remaining portions of this Order.

**ISSUED:**

**TEXAS COMMISSION ON ENVIRONMENTAL QUALITY**

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**Bryan W. Shaw, Ph. D., Chairman  
For the Commission**